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JOSEPH F. SPANIOL, JR.
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No. 84-1859

In The

Supreme Court of the United States

October Term, 1984

STUART MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF FLINT, A Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS, individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI

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I. THE RACIAL QUOTA ADOPTED BY THE FLINT SCHOOL BOARD AND THE TEACHERS' UNION IS DESIGNED SOLELY TO MAINTAIN RACIAL BALANCE.

The Flint Board of Education has argued that Stuart Marsh's demotion, pursuant to a racial quota, is "a constitutionally permissible means" of maintaining enough black counselors to supply necessary educational services.[1] However, no decision of this Court has sanctioned the use of racial preferences in employment absent competent findings of discrimination. *See Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). Maintenance of racial parity does not justify the use of a voluntary racial quota. *See United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).

The Administrative Law Judge ("ALJ") specifically found that there has been no employment discrimination by the School Board. *See In the Matter of Flint Community Schools, et al.,* HEW Docket No. S-115 at 97-99 (1977). There was only a statistical disparity due to an insufficient number of qualified black teachers coupled with the constantly changing racial demographics of the student body. [*Id.* at 98, 99.] Thus, there is no past discrimination in employment to be remedied by the use of a racial preference.

If, as asserted by Respondents, this quota was adopted in response to findings of school segregation, then the plan must vindicate the students' rights. However, students do not have a right to a teaching staff of a particular racial composition. *Oliver v. Kalamazoo Board of Education,*

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[1]Respondent School Board's *Brief in Opposition to the Petition for Writ of Certiorari,* at 4. Hereinafter "School Board."

706 F.2d 757 (6th Cir. 1983). There is only a duty to a sustained good faith effort in hiring. [*Id.* at 762.]

The racial preference at issue was adopted in 1979, two years *after* the ALJ specifically found increased employment of black teachers due to effective affirmative action hiring. There was a sustained good faith effort toward full minority employment which did not require or justify adoption of the racial quota at issue.[2]

II. THE RACIAL QUOTA AT ISSUE VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

The Respondents argue that Stuart Marsh was not injured by the operation of this racial quota. The School Board asserts that "Stuart Marsh was deprived of nothing to which he was entitled." *See* Respondent School Board's Brief at 8. The Union asserts that "Marsh was merely transferred from one position to another." *See* Respondent Union's Brief at 6. These characterizations are incorrect.

Stuart Marsh was demoted from his position as a school counselor. The inescapable conclusion is that the sole factor leading to his demotion was race. Respondents have never alleged nor attempted to prove that Marsh was asked to resume classroom duties because he was unqualified for his position. Rather, he was forced to give up his

[2]The Union has asserted that the record in this case is insufficient to judge "the educational and psychological importance of affirmative action in employment in public education." The School Board asserts the educational needs of black students without reference to any authority, whether legal, psychological, sociological, or otherwise. The record, or lack thereof, is not of Petitioner's making: it was the Respondent School Board's motion for summary judgment which precluded the possibility of developing record.

counseling position and assume the more onerous and less prestigious duties of a classroom teacher because he was white. Marsh was required to teach classes he had never before taught. Moreover, he no longer had the seniority to bid for placement as a counselor in one school. Instead, he had to accept two part-time counseling positions, even though he had more seniority than the black counselors retained in his stead.

There is nothing in the record that justifies imposition of this burden on Stuart Marsh. He has been denied equal protection, because there has been no determination that racial discrimination still existed when the preference was adopted. Moreover, Respondents never made any effort to tailor the remedy to specifically resolve racial disparity in employment without violating Stuart Marsh's constitutional rights.

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CONCLUSION

For the foregoing reasons, the Petitioner respectfully urges this Court to grant the Petition for Certiorari, and hear this case as a companion to *Wygant v. Jackson Board of Education*, No. 84-1340.

Respectfully submitted,

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